UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
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In re:	Chapter 11
CINEMEX HOLDINGS USA, INC. Reorganized Debtor. _____/	Case No. 20-14696-LMI (Formerly Jointly Administered Under Lead Case: Cinemex USA Real Estate Holdings, Inc., Case No. 20-14695-LMI)

REORGANIZED DEBTORS' REPLY TO RESPONSE OF MOAC MALL HOLDINGS LLC TO MOTION FOR EVIDENTIARY HEARING AND/OR SUMMARY DISPOSITION ON EMERGENCY MOTION TO ENFORCE THIRD AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION AND CONFIRMATION ORDER, ECF NO. 204

Cinemex Holdings USA, Inc., Cinemex USA Real Estate Holdings, Inc., and CB Theater Experience LLC (collectively, "Cinemex" or the "Reorganized Debtors") file this Reply (the "Reply) to the Response (the "Opposition") of MOAC Mall Holdings LLC ("MOAC") to the Reorganized Debtors' Motion (the "Motion") for an Evidentiary Hearing and/or Summary Disposition on Cinemex's *Emergency Motion to Enforce the Third Amended Joint Chapter 11 Plan of Reorganization and Confirmation Order, ECF No. 204* (the "Motion to Enforce") and state the following:

Argument

MOAC's Opposition should be seen for what it is: an attempt to delay the dispute and to intimidate Cinemex from pursuing the dispute in order for MOAC to continue to profit from renting Cinemex's FFE[1] to MOAC's new tenant. MOAC raises a new argument in the Opposition

[1] All terms not defined herein shall have the meanings ascribed to them in the Motion.

that this dispute should be an adversary proceeding and not a contested matter because Cinemex is allegedly only now demanding $6 million in damages. First, the Eleventh Circuit case law is clear that disputes arising out of violations of a discharge injunction are contested matters and not adversary proceedings, even where damages are sought. Second, MOAC knew since this dispute has arisen that Cinemex can seek damages pursuant to Article XII.O of the Plan, and that Cinemex specifically sought damages, including to compensate it for the value of the property, and for the fair rental of the property by the new tenant, in the Motion to Enforce, filed on July 27, 2021. MOAC's attempt to only now raise this argument is a pretextual attempt to delay this dispute.

Indeed, MOAC has been delaying this dispute for months, and it cannot now argue that a "truncated" discovery process will deprive it of due process and procedural rights. MOAC has refused to provide Cinemex with documents in response to its discovery requests since August 5, 2021, and has itself not requested discovery, including with respect to the value of the FFE.

Accordingly, MOAC's request to convert this dispute into an adversary proceeding should be denied, and the Court should set a date for an evidentiary hearing at the earliest available date.

I. MOAC'S NEW ARGUMENT THAT THIS DISPUTE SHOULD BE AN ADVERSARY PROCEEDING IS CONTRARY TO ELEVENTH CIRCUIT LAW

Cinemex's request for damages, including for the cost of the equipment it was forced to purchase to replace the FFE, as well as for the rental of the FFE by MOAC's new tenant, does not take this dispute outside of the realm of a contested matter. This dispute has always been about MOAC's violation of the discharge injunction, releases, and vesting provisions of the Plan on account of its refusal to return the FFE to MOAC. *See* Motion to Enforce ¶ 1.

Suddenly, however, MOAC alleges that the dispute does not fall within the "ten specified matters which must be brought as Adversary Proceedings," (*see* Opp. ¶ 48), but none of those are

an action to enforce a discharge injunction. *See* Fed. R. Bankr. P. 7001. The Eleventh Circuit has squarely held that an allegation of a violation of a discharge injunction is a contested matter and not an adversary proceeding. *See Green Point Credit, LLC v. McLean (In re McLean)*, 794 F.3d 1313, 1326 (11th Cir. 2015) (remanding dispute alleging violation of discharge injunction to be converted from adversary proceeding to contested matter).

Cinemex's request for damages in connection with MOAC's violation of the discharge injunction does not alter this law. Not every request for damages must be pursued as an adversary proceeding. *See, e.g. In re Sori*, 513 B.R. 728, 732 n.2 (N.D. Ill. 2014) ("damages requested for a stay violation may be recovered by motion as a contested matter under Federal Rule of Bankruptcy Procedure 9014"). Federal Rule of Bankruptcy Procedure 9020 specifically provides that "a motion for an order of contempt" is governed by Rule 9014, which relates to contested matters. *McLean*, 794 F.3d at 1326. Thus, "[g]enerally speaking, civil contempt sanctions for the violation of the discharge injunction must be sought by contested matter rather than an adversary proceeding." *Id.*; *see also CJ Holding Co. v. Nabors Corp. Svcs., Inc. (In re CJ Holding Co.)*, 597 B.R. 597, 613 (S.D. Tex. 2019) (citing Second, Ninth, and Eleventh Circuit case law in holding that "motions for violations of a plan injunction are 'contested matters' governed by Rule 9014") (internal citation omitted); *Chionis v. Starkus (In re Chionis),* No. CC–12–1501, 2013 WL 6840485, at *4 (B.A.P. 9th Cir. Dec. 27, 2013); *Barrientos v. Wells Fargo Bank, N.A.,* 633 F.3d 1186, 1190 (9th Cir. 2011) (contempt proceedings are always contested matters).

Indeed, "adversary proceedings generally are viewed as stand-alone lawsuits." *Dzikowski v. Boomer's Sports & Recreation Ctr. (In re Boca Arena, Inc.),* 184 F.3d 1285, 1286 (11th Cir. 1999) (internal quotation marks omitted). A contested matter, conversely, is any litigation involving an "actual dispute, other than an adversary proceeding, before the bankruptcy

court." Fed. R. Bankr. P. 2014 advisory committee's note. This dispute is about MOAC's violation of the Plan, which is not an independent issue that should be litigated as a separate lawsuit, but is a request for relief in the context of the main bankruptcy proceeding. Cinemex's request for contempt damages is thus properly brought as a contested matter.

Cinemex's request for consequential damages, including in the form of reasonable rent and replacement equipment costs,[2] also does not bring this dispute within the purview of an adversary proceeding. "The court has broad discretion in selecting appropriate sanctions" for violations of a discharge order. *In re Meyers*, 344 B.R. 61, 66 (Bankr. E.D. Pa. 2006). "Although § 524 does not explicitly authorize monetary damages for a violation of the discharge injunction, a court may award actual damages pursuant to the statutory contempt powers set forth in 11 U.S.C. § 105." *In re Diaz*, No. 6:09-cv-1850-Orl-35, 2010 U.S. Dist. LEXIS 159453, at *27 (M.D. Fla. 2010); *see also Gray v. McCormick (in re Gray)*, No. 16-69785-WLH, 2017 Bankr. LEXIS 3811, at *12 (Bankr. N.D. Ga. Nov. 2, 2017) ("Under Section 105, the Court has authority to award damages to the Debtor for these discharge violations and contempt of the Court's February 6, 2017 order") (citing *McLean*, 794 F.3d at 1325); *In re Baker*, 390 B.R. 524, 532 (Bankr. D. Del. 2008) (sanctions for violation of discharge injunctions serve to "compensate for losses sustained by the disobedience"). Accordingly, Cinemex's request for damages, including consequential damages, does not alter the nature of this dispute as an allegation of violation of the discharge injunction, which is a contested matter.[3]

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[2] MOAC argues in the Opposition that "[i]t is assumed Cinemex purchased the new multimillion-dollar replacement equipment sometime after the emergency hearing." Opp. ¶ 39. That is incorrect.

[3] Moreover, to the extent that this Court does not believe that it can grant consequential damages for contempt, Cinemex can seek those damages through an adversary proceeding following the resolution of the contested matter as to the violation of the discharge injunction.

II. MOAC KNEW OR SHOULD HAVE KNOWN THAT THIS DISPUTE ALWAYS INCLUDED A REQUEST FOR DAMAGES

Cinemex's request for damages was explicitly made in the Motion to Enforce, and the damages are specifically permitted in Article XII.O of the Plan, on which the Motion to Enforce relied in making its request. MOAC's argument that the request in the Motion "far exceeds what was sought by the original Motion to Enforce" because Cinemex "now" seeks "damages of more than $6 million" (Opp. Intro) is in direct contradiction of the second page of the Motion to Enforce, which states that Cinemex seeks an order requiring MOAC to "return and account for all property of the estate…, and ***compensate the Reorganized Debtors for the value of the property***, the ***fair rental of the property used or retained***, plus all attorneys' fees and costs..." *See* Mot. Enforce, at 1.

Moreover, the Motion to Enforce quotes Article XII.O of the Plan which states that "[u]pon an event of default, the Reorganized Debtors… may seek to hold the defaulting party in contempt of the Confirmation Order… Upon the finding of such a default by a creditor, the Bankruptcy Court may:… (c) award judgment against such defaulting creditor in favor of the Reorganized Debtors… including interest, to compensate the Reorganized Debtors… for the damages caused by such default; and (d) make such other order as may be equitable that does not materially alter the terms of the Plan." Mot. Enforce ¶ 13. MOAC was thus aware at least as of the date of the filing of the Motion to Enforce (July 27, 2021) that Cinemex would seek damages pursuant to MOAC's violation of the discharge injunction and other provisions of the Bankruptcy Code.

MOAC appears to allege that it believed that the FFE was only worth $700,000.00, referencing the digital projection equipment that Cinemex purchased from MOAC for $700,000.00 (*see* Opp. ¶ 2). But, that is not the only equipment at issue. It is simply the only equipment that Cinemex purchased from MOAC. Cinemex has been clear for months that the equipment

encompasses everything at the MOA theater and that the value of the FFE is millions of dollars. *See, e.g.*, July 28 Hr'g Tr. 10:19-21 ("It's over a million dollars' worth of equipment that's in that location that's being used by the substitute tenant"). Moreover, the Lease itself makes clear that MOAC expected Cinemex to undergo a complete renovation of the premises for no less than $5 million *not including* the amount Cinemex was required to spend on "furniture, fixtures and equipment including A/V, theater seats, concessions, floor lighting, etc." *See* Lease § 3.1. It cannot be disputed that the amount at issue was always in excess of some "used" projectors.[4]

III. MOAC'S ARGUMENT THAT RESOLUTION OF THIS DISPUTE VIA A CONTESTED MATTER WOULD DEPRIVE IT OF DUE PROCESS AND PROCEDURAL RIGHTS IS INAPPOSITE BECAUSE IT HAS REFUSED TO PURSUE DISCOVERY

For two months following the July 28 Hearing, MOAC made no efforts to find out the value of the FFE. While MOAC knew or should have known that Cinemex was seeking damages for the value of the equipment and fair rental of the property (*see* discussion in Section II above), MOAC made no effort to find out what those damages were. For instance, while MOAC made certain requests of Cinemex in early August, none of those requests demanded a valuation of the FFE. It was not until September 23, 2021 that MOAC's counsel even *suggested* that counsel to both parties find out what their clients believe the FFE is worth. In response to that suggestion, on October 13, 2021, Cinemex sent MOAC the Settlement Demand Letter in which it provided the value of the FFE. *See* Opp. Ex. C.

[4] In addition, contrary to the Opposition, it is not true that Cinemex "clearly didn't value [the equipment] and left [it] sitting unattended for over a year." Opp. ¶ 40. Cinemex requested the return of that equipment shortly after the Effective Date of the Plan, but MOAC refused to permit Cinemex to obtain it. It was MOAC that was under an obligation to either return the FFE to Cinemex pursuant to the Plan or section 542(a) of the Bankruptcy Code or to file a request for relief from the automatic stay in order to assert rights over the FFE. *See Thompson-Mendez v. St. Charles at Olde Court P'ship, LLC*, 321 B.R. 814 (Bankr. D. Md. 2005) (debtor must abandon property under Section 554 or landlord must seek relief from the stay). MOAC did neither.

Other than the September 23 suggestion, MOAC never made a request to Cinemex for the value of the FFE, even despite Cinemex's request and MOAC's agreement on September 23 that MOAC would provide Cinemex with a bullet point list of documents that MOAC wants from Cinemex. MOAC not only did not request to know the value of the FFE, but failed to this day—over a month later—to make *any* requests to Cinemex.[5] Thus, MOAC's argument that it did not know that this was a $6 million dispute, and that a "truncated" discovery process would deprive MOAC of due process and procedural protection (Opp. ¶¶ 46-48), rings hollow, because MOAC cannot now allege that it could not have previously known what the value of the FFE was when it made no efforts to find that out, and one would surmise that it did not provide use of the FFE to B&B without being aware of its value. MOAC's refusal to engage in discovery efforts should not be pushed onto Cinemex in the form of further extending the resolution of this dispute and costing Cinemex additional fees to litigate it as an adversary proceeding.

IV. MOAC HAS REFUSED TO PRODUCE DISCOVERY AND CANNOT RELY ON INFORMATION IT HAS REFUSED TO PRODUCE

While simultaneously not asking for documentation relating to the value of the FFE, MOAC tries to rely on documents that it has refused to produce to Cinemex despite multiple requests. Specifically, MOAC's argument that "MOAC corporate counsel… did not receive the January 14 Email sent to joe.calascibetta@triplefive.com" (*see* Opp. ¶ 17), which Cinemex sent in January to request its equipment, and to which it received a response stating that the equipment does not belong to it, is improper. First, at the July 28 Hearing, MOAC admitted that Triple Five

[5] Cinemex did provide MOAC with a bullet point list of document requests on September 24—the same requests it had made on August 5, as well as on September 9 through formal discovery. Yet, MOAC failed to provide Cinemex with documents in response to those past-due requests.

is the owner of MOAC.[6] July 28 Hr'g Tr. 14:9-13 ("I believe they [Triple5] are an ownership entity at Mall of America"). In fact, Cinemex's correspondence regarding the Lease, the FFE, and everything relating to MOAC, was always with Mr. Calascibetta, and Mr. Calascibetta's email reflects his agency over MOAC's affairs.

Second, MOAC's reliance on this correspondence and on the "diligent search of email communications by in-house corporate counsel of MOAC" (Opp. ¶ 17) is at odds with the federal rules of discovery and civil procedure. MOAC cannot plead the absence of communications while at the same time failing and refusing to produce to Cinemex any communications in response to Cinemex's formal discovery requests. MOAC failed to produce a single communication in discovery.

Third, even in relying on communications that it failed to produce to Cinemex, MOAC did not state whether it knew about the January communication with Mr. Calascibetta, or whether anyone other than MOAC corporate counsel received the communication. Conveniently, MOAC limited its statement to "MOAC corporate counsel… not receiv[ing] the January 14 Email." Opp. ¶ 17. Such a statement leaves very open the question of whether someone else at MOAC was aware of the correspondence (and undoubtedly someone was).[7]

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[6] MOAC also regurgitates its argument that the FFE is not property of the estate, spending several paragraphs (as well as apparently a significant amount of time via review of the Schedules) arguing that the FFE was not listed on the Debtors' Schedules (*See* Opp. ¶¶ 30-33), even though the Court already decided that issue at the July 28 Hearing. *See* Hr'g Tr. 21:9-12 ("I think the scheduled issue has been answered for you, Mr. Coaty, and the fact that the addresses were listed in the schedules…"). And on this point, MOAC consumes its own tail because unscheduled property can never be abandoned. 11 U.S.C. § 554(d).

[7] In addition to refusing to produce discovery, MOAC has also still not granted Cinemex the right to enter the premises. While the Opposition states that on July 15, 2021, Cinemex was allowed to retrieve personnel records and some equipment (Opp. ¶ 26), it leaves out the fact that, despite the Court requiring it at the July 28 Hearing, MOAC has still not permitted Cinemex to enter the premises and conduct a full inventory of the FFE. *See* July 28 Hr'g Tr. 19:18-20 ("At some point, Mr. Coaty, you can facilitate allowing someone from Cinemex to go in and take a look at the property").

In any event, it is actually irrelevant whether MOAC knew that Cinemex asked its contact at the landlord for the FFE, because under the Plan, the Bankruptcy Code, and for the reasons set forth in the Motion, Cinemex could not have abandoned the FFE prior to the Final Decree, and MOAC never gave Cinemex a chance to abandon the FFE after the Final Decree because it leased the FFE to a third party one week prior to the entry of the Final Decree.[8]

WHEREFORE, the Reorganized Debtors respectfully request that the Court enter an order granting the Motion and setting an evidentiary and summary judgment hearing at the earliest possible date, and granting such other relief as the Court deems appropriate.

Respectfully submitted this 25th day of October, 2021.

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[8] MOAC conveniently leaves out all references to MOAC's lease of the premises to B&B prior to the entry of the Final Decree. It also still has not provided legal support for its argument that Cinemex abandoned the FFE despite the Court's request. *See* July 28 Hr'g Tr. 20:10-12 ("I'll expect legal memorandum from you, Mr. Coaty, on the issue of abandonment"). Moreover, MOAC has yet to correct the misstatement its counsel made to the Court on July 28 that B&B took possession of the MOA property *after* the final decree. *See* July 28 Hr'g Tr. 9:6-12.

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